ROBIN RADJAINI SAIH v. PP

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
COLLIN LAWRENCE SEQUERAH JCA
WONG KIAN KHEONG JCA
[CRIMINAL APPEAL NO: S-05(M)-186-05-2021]
4 AUGUST 2024

Abstract – *The 'rarest of the rare' doctrine should not be adopted in Malaysia as the Legislature, through s. 302 of the Penal Code, has granted Malaysian courts with wide judicial discretion in sentencing for murder. Such unfettered discretion ought to be exercised based on public interest and after considering all the relevant factors, including the four objects of sentencing, namely, (i) deterrence, (ii) rehabilitation, reformation or restoration; (iii) retribution; and (iv) restitution. The 'rarest of the rare' doctrine, if applied, would tantamount to unlawful curtailment of the wide judicial discretion.*

CRIMINAL PROCEDURE: *Appeal – Appeal against sentence – Appeal against sentence of High Court – Appellant charged with murder – Appellant found guilty and sentenced to death – Whether case fell under doctrine of 'rarest of the rare' – Whether doctrine ought to be adopted – Whether would tantamount to unlawful curtailment of wide judicial discretion – Whether death sentence ought to be substituted with sentence of imprisonment – Penal Code, s. 302 – Abolition of Mandatory Death Penalty Act 2023, ss. 34 & 39*

CRIMINAL PROCEDURE: *Sentencing – Principles – Doctrine of 'rarest of the rare' – Appellant charged with murder – Appellant found guilty and sentenced to death – Whether case fell under doctrine of 'rarest of the rare' – Whether doctrine ought to be adopted – Penal Code, s. 302 – Abolition of Mandatory Death Penalty Act 2023, ss. 34 & 39*

The appellant was charged in the High Court for murder under s. 302 of the Penal Code ('PC'). PW9, who was 12 when the incident happened and 15 when he testified in court, was the brother-in-law of the victim ('deceased') and was the prosecution's prime witness. PW9 testified that: (i) the deceased had fetched PW9 from school and said that he had to collect RM300 from someone. The deceased then stopped the car at a road and told PW9 to wait; (ii) after ten minutes, PW9 saw the appellant walking towards the deceased's car before opening the door and sitting behind the deceased. According to PW9, the deceased then drove the car with PW9 and the appellant; (iii) PW9 fell asleep but was woken up when the deceased called him. PW9 saw the appellant pulling the deceased's hair while cutting the deceased's throat twice with a parang. PW9 too suffered severe injuries as he was attacked by the appellant; (iv) the appellant fled on foot when the car came to a halt; (v) PW9

later attended an identification parade at the police headquarters and identified the appellant as the person who attacked him and the deceased. PW9 also identified the parang used during the incident. After deciding that the prosecution had proven a *prima facie* case of the charge, the trial judge called on the appellant to enter his defence. The appellant relied on the defence of provocation. The trial judge then decided that the prosecution had proven the charge beyond all reasonable doubt and convicted the appellant of the charge. The appellant was sentenced to death. Hence, the present appeal against the sentence only. Both the appellant and the prosecution relied on the 'rarest of the rare' doctrine. The appellant submitted that the death sentence imposed by the High Court should be substituted with the sentence of 30 years' imprisonment because this case was not the 'rarest of the rare'. Further, the appellant could not be whipped because he was 50 years old. Meanwhile, the prosecution persuaded the court to maintain the death sentence imposed by the High Court by submitting that this case was one of the 'rarest of the rare'.

Held (dismissing appeal; affirming sentence of High Court)
Per Wong Kian Kheong JCA delivering the judgment of the court:

(1) The court was not in favour of adopting the 'rarest of the rare' doctrine in Malaysia for the following reasons, *inter alia*, (i) in s. 302 of the PC read with ss. 34 and 39 of the Abolition of Mandatory Death Penalty Act 2023, Parliament had conferred a wide discretion on courts to mete out the following punishment on a person who has committed a murder offence under s. 302 of the PC: (a) death penalty; or (b) imprisonment for a term of not less than 30 years but not exceeding 40 years and whipping of not less that 12 strokes ('wide judicial discretion'); (ii) our Legislature did not impose any restriction or condition to curtail the wide judicial discretion above. In other words, the wide judicial discretion was unfettered. If the 'rarest of the rare' doctrine is applied, this would tantamount to unlawful curtailment of the wide judicial discretion; (iii) in the exercise of the wide judicial discretion, (a) public interest should be the primary consideration; (b) all the relevant facts and circumstances of the case should be taken into account, including the mitigating and aggravating factors; and (c) the court should consider the four objects of sentencing, *ie*, (1) deterrence – both specific and general; (2) rehabilitation, reformation or restoration of the offender; (3) retribution; and (4) restitution. (para 31)

(2) Premised on the wide judicial discretion, the death sentence imposed by the High Court was maintained for the following reasons: (i) it was in the public interest for the death sentence to be maintained because: (a) the existence of the appellant's pre-meditated intention to murder not only the deceased but also PW9; (b) the appellant's pre-meditated intention to murder was carried out in the most violent manner by inflicting wound to the deceased's neck; (c) the appellant had cause

severe injuries to PW9. PW9 would also suffer permanent psychological and emotional trauma due to the assault; and (d) in accordance with the aim of public deterrence, a clear message must be sent to the public that any person who carries out his or her pre-meditated intention to murder another person and at the same time attempts to murder a child witness, should face the death sentence. The above considerations regarding public interest far outweighed the appellant's mitigating circumstances; (ii) the appellant did not show any remorse because he had given untrue sworn evidence as follows: (a) despite the existence of his pre-meditated intention to murder, the appellant alleged that the deceased's verbal provocation had been made; and (b) PW9's finger was cut because he tried to take away the parang from the appellant. It defied belief how a 12-year-old boy could attempt to take the parang from a person who had just murdered the boy's brother-in-law in the presence of the boy. (para 34)

Case(s) referred to:
Bachan Singh v. State Of Punjab [1980] 1 MLJ (Cri) 684 ***(refd)***
Bhandulananda Jayatilake v. PP [1981] CLJU 139; [1981] 1 LNS 139 FC ***(refd)***
Fong Kong Meng & Anor v. PP [2019] 9 CLJ 301 FC ***(refd)***
Khairul Azizi Abdul Jalil v. PP [2024] CLJU 1447 CA ***(refd)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(refd)***
Maria Elvira Pinto Exposto v. PP [2020] 5 CLJ 1 FC ***(refd)***
PP v. Kho Jabing [2015] 2 SLR 112 ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***

Legislation referred to:
Abolition of Mandatory Death Penalty Act 2023, ss. 34, 39
Criminal Procedure Code, ss. 180(1), (3), 182A(2), 289(c)
Evidence Act 1950, ss. 27(1), 105, 118
Evidence of Child Witness Act 2007, ss. 3(1)(a), 4(1), 45(1)
Penal Code, ss. 299, 300(a), (b), (c), (d), 302

Criminal Procedure Code [Ind], s. 354(3)
Penal Code [Sing], s. 302(2)

For the appellant - Darmin Achok & Abdul Gani Zelika; M/s Johari Zelika & Amin
For the respondent - Sarulatha Paramavathar; DPP

[Editor's note: For the High Court judgment, please see PP v. Robin Radjaini Saih [2021] CLJU 558; [2021] 1 LNS 558 (affirmed).]

Reported by Lina E

JUDGMENT

Wong Kian Kheong JCA:

Introduction

[1] This judgment discusses the exercise of the Court of Appeal's discretion pursuant to ss. 34 and 39 of the Abolition of Mandatory Death Penalty Act 2023 (AMDP) to:

A (i) maintain a death sentence imposed by the High Court (before the enforcement of the AMDP); or

(ii) reduce the death sentence to an imprisonment term from 30 to 40 years and whipping of not less than 12 strokes

B for a murder offence under s. 302 of the Penal Code (PC).

In this regard, whether a death sentence can only be imposed by the court under s. 302 of the PC read with ss. 34 and 39 of the AMDP:

(i) in the "rarest of the rare" case as expounded in cases decided by the Indian Supreme Court; or

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(ii) after the court has taken into account all the relevant facts, circumstances and considerations regarding the case in question with public interest as the primary consideration.

Proceedings In The High Court

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[2] The abovenamed appellant (appellant) was charged by the Public Prosecutor (PP) with one count of murder under s. 302 of the PC. We reproduce below the charge against the appellant in our National Language (charge):

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> Bahawa kamu pada 24 April 2018 jam di antara 1.20 petang hingga 1.40 petang, di simpang masuk Taman Warisan 4, dalam daerah Lahad Datu, dalam Negeri Sabah, telah membunuh Fazrin bin Ibrahim, No. KP: 880229-12-5011 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.
>
> Hukuman: Hendaklah dihukum mati.

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The Prosecution's Case

[3] The prosecution called ten witnesses to prove the charge. We shall refer to the evidence of the following four prosecution witnesses:

G (i) Encik Ibrahim bin Intong (PW5);

(ii) Inspector Muhammad Nur Faez Hazreeq Abdullah (PW7);

(iii) Dr Jessie Hiu @ Jessie Dorey Hiu Chen Chen (PW8); and

(iv) Hardisyam bin Saparuddin (PW9).

H **[4]** PW5 is the father of the late Fazrin bin Ibrahim (deceased), the person alleged in the charge to have been murdered by the appellant, while PW9 is the deceased's brother-in-law.

[5] On 24 April 2018, PW9 was 12 years old. When PW9 testified in this case, he was almost 15 years old. With regards to PW9's evidence:

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(i) the learned High Court Judge questioned PW9 in court and found that PW9 understood the nature and solemnity of the oath. This means that the High Court was satisfied that PW9 was competent to testify as understood in s. 118 of the Evidence Act 1950 (EA). Section 118 of the EA provides as follows:

> s 118. *Who may testify*
>
> *All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years,* extreme old age, disease, whether of body or mind, *or any other cause of the same kind.*
> (emphasis added)

(ii) as PW9 was a "child witness" (below the age of 18 years old) within the meaning of s. 3 of the Evidence of Child Witness Act 2007 (ECWA), he gave evidence in this case according to ss. 3(1)(a) and 4(1) of the EWCA, namely, there was a screen placed in the courtroom which separated him from the appellant. Consequently (except for the occasion wherein PW9 identified the appellant in court), at all times during PW9's testimony in court, PW9 could not see the appellant and nor could the appellant see PW9.

[6] PW9 gave the following evidence in court, among others:

(i) on 24 April 2018:

(a) at about 6.20am, the deceased had sent PW9 to PW9's school at Sekolah Kebangsaan Batu 6½ Lahad Datu (school) in the deceased's car bearing the registration no. SD 3801L (car). PW9 had asked the deceased to fetch him from the school at 1pm on the same day;

(b) at about 1pm, 24 April 2018, the deceased drove the car and fetched PW9 from the school. PW9 sat in the front passenger seat. Inside the car, the deceased informed PW9 that the deceased had to collect RM300 from a person in Taman Warisan. PW9 did not know who was this person. The deceased then drove the car from the school to Taman Warisan;

(c) on the way to Taman Warisan, PW9 heard the deceased talking to a person on "WhatsApp voice call" in what PW9 thought to be a mixture of Malay and Suluk languages. PW9 could only understand that the deceased had talked on "WhatsApp" about RM300;

(d) the deceased stopped the car beside the road at Taman Warisan. The deceased informed PW9 that the deceased was waiting for a "Pak Cik". While waiting for the "Pak Cik", the deceased called the "Pak Cik" and informed the "Pak Cik" that the deceased was waiting for the "Pak Cik" beside the road at Taman Warisan;

A (e) after waiting for about ten minutes, PW9 saw the appellant walking towards the car in a grey sweater and denim short pants. PW9 did not see the appellant carrying anything. The appellant opened the door to the front passenger seat of the car and looked at PW9 for about ten seconds. The appellant then closed the door to the front
B passenger seat, opened the door to the right rear seat and sat behind the deceased inside the car;

(f) the deceased drove the car with PW9 and the appellant inside the car. PW9 noticed that the deceased asked the appellant "300 macam mana" and the appellant answered in a language which PW9 could
C not understand;

(g) while the deceased was driving the car, PW9 fell asleep as he was tired. Suddenly, PW9 woke up when he heard the deceased shouting PW9's nickname, "Ichang". PW9 saw the appellant pulling the deceased's hair with the appellant's left hand while cutting the
D deceased's throat twice with a parang (exh. 30(c)) with the appellant's right hand. The deceased went out of the moving car and fell;

(h) the appellant attacked PW9 with the parang and caused the following injuries to PW9:
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(1) the fifth finger on PW9's left hand was severed; and

(2) a slash wound was inflicted on PW9's right jaw

(PW9's severe injuries); and

F (i) when the car came to a halt, the appellant fled on foot. Despite PW9's severe injuries, he got out of the car and sought help from the public for the deceased (who was lying by the side of the road). However, PW9's efforts were in vain and the deceased had passed away;

G (ii) on 2 May 2024, PW9 attended an identification parade at Lahad Datu's District Police Headquarters and identified the appellant as the person who attacked the deceased and PW9 on 24 April 2018; and

(iii) PW9 identified exh. 30(c) in court as the parang, which was used by the
H appellant to attack the deceased and PW9 on 24 April 2018.

[7] PW7 testified in court with regards to what transpired on 25 April 2018, among others:

(i) PW7 acted on information received by him and assembled a team of police officers;
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(ii) PW7 and team arrested the appellant behind Taman Harapan, Jalan Silam, Lahad Datu;

(iii) after the appellant's arrest, the appellant gave the following information to PW7 (appellant's information): A

> **Aku buang utak-utak (small parang) dan baju yang aku pakai masa bunuh orang tu. Aku boleh tunjuk tampatnya sama Tuan**
> (emphasis added)

(iv) based on the appellant's information, PW7 "discovered" the following exhibits in an unnamed squatter house, Taman Harapan, in the presence of the appellant: B

(a) exhibit 30(c) (parang);

(b) the scabbard of exh. 30(c); and C

(c) one long sleeve t-shirt, one sweater and one pair of denim short pants worn by the appellant at the time of the murder of the deceased

(Discovery of exhibits (appellant's information)).

PW7 recorded the fact of discovery of exhibits (appellant's information) in a search list on 25 April 2024 (search list). The appellant acknowledged the contents of the search list by affixing his thumbprint on the search list. D

[8] PW8 is a Forensic Medical Specialist in Queen Elizabeth Hospital, Kota Kinabalu. PW8's expertise as a forensic medical specialist had not been challenged by the appellant's learned counsel at the trial. PW8 prepared a report regarding her forensic examination of the deceased's body (exh. P56) and gave the following expert opinion under s. 45(1) of the EA: E

(i) there was an incised wound of about 17cm long across the front and both sides of the deceased's neck (deceased's neck wound (17cm long)). The deceased's neck wound (17cm long) was the cause of death of the deceased because in the deceased's neck wound (17cm long): F

(a) there was a complete cut of the left carotid artery, left jugular vein, larynx and the body of the thyroid cartilage; and G

(b) there was a partial cut of the left vertebral artery and oesophagus;

(ii) there were two superficial injuries on the right side of the deceased's neck and on the deceased's right shoulder joint;

(iii) there was an incision on the deceased's right thumb; and H

(iv) the injuries suffered by the deceased were consistent with those caused by a sharp object such as a parang.

[9] PW5 identified a body of a deceased male at the Forensic Department, Lahad Datu Hospital, as the body of the deceased. I

Whether Prosecution Had Proven A Prima Facie Case Of The Charge

[10] After the close of the prosecution's case, the learned judge heard submissions from learned Deputy Public Prosecutor (DPP) and defence counsel on whether the prosecution had proven a *prima facie* case of the charge under s. 180(1) of the Criminal Procedure Code (CPC).

[11] According to the learned judge's "grounds of judgment" (GOJ), on a maximum evaluation of the prosecution's evidence, a *prima facie* case of the charge under s. 180(3) of the CPC had been proven beyond all reasonable doubt because:

(i) the identity of the deceased had been proven by way of PW5's evidence;

(ii) premised on PW8's expert view, the deceased's neck wound (17cm long) was the cause of the deceased's death;

(iii) PW9's evidence had proven that the deceased's death was caused by the appellant's acts; and

(iv) by reason of the testimonies of PW8 and PW9, the appellant's intention in causing the death of the deceased fell within s. 300 of the PC.

[12] After deciding that the prosecution had proven a *prima facie* case of the charge, the learned judge called on the appellant to enter his defence. The High Court then explained the three options available to the appellant. The appellant elected to testify under oath.

The Appellant's Sworn Evidence

[13] The appellant gave the following testimony in his defence, among others:

(i) the appellant is a Filipino citizen of Suluk ethnicity who stayed in Sabah illegally;

(ii) the appellant had worked for the deceased as a collector for "Wahui" gambling bets placed with the deceased. After the appellant's collection of the money (for the gambling bets), the appellant would hand over the money to the deceased twice a week;

(iii) on 23 April 2018:

(a) at noon time, the deceased called the appellant to hand over RM900 in gambling bets to the deceased. The appellant informed the deceased that the appellant had only collected RM700 and the balance of RM200 had yet to be collected by the appellant;

(b) at 1pm, the appellant handed over RM700 to the deceased; and

(c) the deceased asked the appellant to hand over RM200 to the deceased the next day; and

(iv) on 24 April 2018:

(a) the appellant met the deceased who was in the car in Taman Warisan;

(b) the deceased asked the appellant to get into the car and to meet the deceased's "tauke";

(c) the appellant got into the car and the deceased drove the car;

(d) the deceased demanded for the appellant to hand over RM200 to the deceased. The appellant however informed the deceased that the appellant had yet to receive RM200. Hence, the appellant could not hand over RM200 to the deceased;

(e) the deceased verbally provoked the appellant by shouting repeatedly at the appellant as follows:

(1) the deceased repeatedly called the appellant in Suluk language an "iruk" (dog);

(2) the deceased accused the appellant of taking the RM200; and

(3) the deceased threatened to report the appellant to the police with regards to the RM200

(alleged deceased's verbal provocation);

(f) due to the alleged deceased's verbal provocation, the appellant lost control of himself and killed the deceased with the parang (exh. 30(c));

(g) with regards to PW9:

(1) PW9 was awake and had heard the verbal exchange between the deceased and the appellant; and

(2) PW9's finger was cut because PW9 tried to take away the parang from the appellant; and

(h) after the deceased's throat was slit by the appellant, the deceased stopped the car and went out. The appellant also left the car and fled thereafter.

[14] Besides the appellant's own evidence, he did not call any witness to give evidence in his defence.

Did Prosecution Prove Charge Beyond All Reasonable Doubt After Close Of Defence Case?

[15] After the close of the defence case, the learned judge heard submissions from learned DPP and defence counsel. His Lordship then decided that the prosecution had proven the charge beyond all reasonable

doubt and convicted the appellant of the charge pursuant to s. 182A(2) of the CPC (Conviction (High Court)). The GOJ had provided for the grounds for the Conviction (High Court) as follows, among others:

(i) the appellant had the evidential burden under s. 105 of the EA to prove on a balance of probabilities the defence of "grave and sudden provocation" within the meaning of exception 1 to s. 300 of the PC (exception 1);

(ii) applying an objective test of a reasonable person with the appellant's background and circumstances, the appellant had failed to prove the application of exception 1 in this case;

(iii) there was evidence to show that the appellant had the pre-meditated intention to kill the deceased. As such, the appellant was not deprived of the power of self-control when he slit the throat of the deceased; and

(iv) it was a hot day on 24 April 2018 but the appellant wore two layers of long-sleeved clothing, including a sweater, so as to conceal the parang which was used to kill the deceased.

[16] Upon the conviction (High Court), the learned judge was bound under the then applicable law to impose the mandatory death sentence on the appellant under s. 302 of the PC (death sentence (High Court)).

The Appellant's Appeal To The Court Of Appeal

[17] The appellant filed an appeal to the Court of Appeal against both the conviction (High Court) and death sentence (High Court) (this appeal).

[18] When this appeal was heard, the appellant's learned counsel informed the Court of Appeal that she had been instructed by the appellant to:

(i) withdraw the appellant's appeal against the conviction (High Court); and

(ii) proceed only with the appellant's appeal against the death sentence (High Court)

(appellant's decision).

[19] The Court of Appeal directed the court-appointed Suluk interpreter (interpreter) to inquire from the appellant on whether the appellant's decision had been made (as informed to the court by the appellant's learned counsel). After the interpreter inquired from the appellant in Suluk language, the interpreter confirmed to the Court of Appeal that the appellant's decision had indeed been made.

[20] We then heard oral submissions from learned DPP and counsel for the appellant regarding the appellant's appeal against the death sentence (High Court) (appeal (death sentence)). Thereafter, we stood down the appeal (death sentence) for our deliberations. After our deliberations, we gave our broad grounds on why we dismissed the appeal (death sentence). This judgment contains our full reasons for maintaining the death sentence (High Court).

The Appellant's Appeal To The Federal Court

[21] The appellant's notice of appeal to the Federal Court has stated that he is now appealing to the Federal Court against the Court of Appeal's decision which affirmed the conviction (High Court) and death sentence (High Court).

Whether The Conviction (High Court) Was Safe

[22] Notwithstanding the appellant's decision (the appellant's withdrawal of his appeal to the Court of Appeal against the conviction (High Court)), we will now give our reasons why the conviction (High Court) is safe as explained by the Federal Court's judgment delivered by David Wong Dak Wah CJ (Sabah and Sarawak) in *Fong Kong Meng & Anor v. PP* [2019] 9 CLJ 301; [2019] 12 MLJ 110, at [19].

[23] We reproduce below the relevant parts of ss. 299 and 300 of the PC:

s 299. Culpable homicide

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

s 300 Murder

Except in the cases hereinafter excepted, culpable homicide is murder -

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

Exception 1 - Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

A (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation - Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

(emphasis added)

B **[24]** We have no hesitation to affirm the conviction (High Court) on the following grounds:

(i) the appellant's information and the discovery of exhibits (appellant's information) were lawfully admitted as evidence by the learned judge under s. 27(1) of the EA – please refer to the Federal Court's judgment C delivered by Ahmad Maarop FCJ (as he then was) in *Siew Yoke Keong v. PP* [2013] 4 CLJ 149; [2013] 3 MLJ 630, at [28]. Section 27(1) of the EA states as follows:

s 27 How much of information received from accused may be proved

D *(1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.*

(emphasis added)

E PW7's testimony regarding the appellant's information and PW7's discovery of exhibits (appellant's information) was supported by contemporaneous documentary evidence, namely, the search list;

(ii) the appellant's information and PW7's discovery of exhibits (appellant's information), especially the discovery of exh. 30(c) (parang), supported F PW9's testimony that the appellant had caused the deceased's neck wound (17cm long) by using exh. 30(c);

(iii) the learned judge made the right inference that the appellant had the pre-meditated intention to murder the deceased (appellant's pre-meditated intention (murder)). This inference regarding the existence of the G appellant's pre-meditated intention (murder) is irresistible in view of the following evidence:

(a) despite the fact that it was a hot day on 24 April 2018, the appellant deliberately concealed exh. 30(c) by wearing two layers of long-H sleeved clothing, including a sweater; and

(b) the appellant concealed exh. 30(c) when he approached and entered the car;

(iv) the existence of the appellant's pre-meditated intention (murder) disproved the alleged deceased's verbal provocation. Accordingly, there I was no basis for the appellant to rely on exception 1 in this case;

(v) even without the existence of the appellant's pre-meditated intention (murder), the appellant had failed to prove on a balance of probabilities under s. 105 of the EA that exception 1 could apply in this case.

Firstly, as explained by George Edward Seah SCJ in the Supreme Court in *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162; [1988] 1 MLJ 251, at 253, exception 1 applies an objective test of whether a reasonable person "belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control".

We are of the view that the above test had been correctly applied by the learned judge in this case. Even assuming that the alleged deceased's verbal provocation had been made, a reasonable person belonging to the same class of society as the appellant, placed in the situation in which the appellant was placed in this case, would not have been so provoked by the alleged deceased's verbal provocation so as to lose his self-control and use exh. 30(c) to inflict the deceased's neck wound (17cm long);

(vi) the existence of the appellant's pre-meditated intention (murder) and expert testimony of PW9 proved beyond all reasonable doubt the *mens rea* of the appellant to murder the deceased as follows:

(a) all the three alternative limbs of "culpable homicide" in s. 299 of the PC were satisfied in this case, namely, the appellant had inflicted the deceased's neck wound (17cm long) with the:

(1) "intention of causing death" of the deceased;

(2) "intention of causing such bodily injury as is likely to cause death" to the deceased; and/or

(3) "with the knowledge that (the appellant) is likely by such act to cause death" of the deceased; and

(b) all the four alternative paras. (a) to (d) of s. 300 of the PC were proven in this case because the deceased's neck wound (17cm long) was caused by the appellant:

(1) "with the intention of causing death" to the deceased – s. 300(a) of the PC;

(2) "with the intention of causing such bodily injury as the (appellant) knows to be likely to cause the death" of the deceased – s. 300(b) of the PC;

(3) "with the intention of causing bodily injury to (the deceased), and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death" of the deceased – s. 300(c) of the PC; and/or

(4) whereby the appellant "knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury" – s. 300(d) of the PC; and

(vii) the learned judge's finding of fact that the appellant had murdered the deceased as charged was not against the weight of evidence – please refer to the Federal Court's judgment delivered by Tengku Maimun CJ in *Maria Elvira Pinto Exposto v. PP* [2020] 5 CLJ 1; [2020] 3 MLJ 21, at [34].

The Court's Discretionary Power To Reduce The Death Sentence (High Court)

[25] Sections 34 and 39 of the AMDP provide as follows:

s 34. Amendment of section 302 [PC]

Section 302 [PC] is amended by inserting after the words "with death" the words "or imprisonment for a term of not less than thirty years but not exceeding forty years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes".

s 39. Transitional

Upon the coming into operation of [AMDP], if a person is convicted by any court for the commission of an offence under section 121, 121A, *302* or 364 or paragraph 130C(1)(a), 130I(a), 130N(a), 130O(1)(aa), 130QA(a), 130ZB(a) or 374A(a) *[PC], the person, whether at a trial or on an appeal, shall be sentenced in accordance with the provisions of [PC] as amended by [AMDP] even though the offence was committed before the date of coming into operation of [AMDP].* (emphasis added)

[26] It is clear from s. 39 of the AMDP that s. 34 of the AMDP applies retrospectively to this case.

[27] In the Court of Appeal case of *Khairul Azizi Abdul Jalil v. PP* [2024] CLJU 1447; [2024 1 LNS 1447; [2024] MLJU 1463, at [48], SM Komathy JCA has explained the application of the "rarest of the rare" doctrine as follows:

[48] As regards sentence, in light of [AMDP], it is now no longer mandatory on the Court to impose the death penalty to everyone convicted of murder. The death sentence should only be imposed in the most extreme and exceptional murders which are the 'worst of the worst' or the 'rarest of the rare' and only after determining the question of the accused's possibility of reform. Counsel for the appellant urged the court to commute the death sentence to a sentence of imprisonment of 30 years as the murder committed by appellant did not fall within the category of 'the worst of the worst' or 'the rarest of the rare'. The learned deputy did not press for the death sentence to be maintained and left it to the court but submitted that any imprisonment imposed should not be less than 35 years. (emphasis added)

[28] In this appeal, both learned counsel for the appellant and DPP had relied on the "rarest of the rare" doctrine. According to the appellant's learned counsel, the Court of Appeal should substitute the death sentence (High Court) with 30 years imprisonment because this case was not the "rarest of the rare". The appellant cannot be whipped pursuant to s. 289(c) of the CPC because he is now more than 50 years old. Learned DPP sought to persuade us to maintain the death sentence (High Court) by submitting that this case was one of the "rarest of the rare".

[29] Our research has not disclosed any judgment of the Federal Court regarding the application of the "rarest of the rare" doctrine.

[30] The "rarest of the rare" doctrine is now firmly established in India. In *Bachan Singh v. State Of Punjab* [1980] 1 MLJ (Cri) 684, at [195], in delivering the 4-1 majority decision of the Indian Supreme Court, RS Sarkaria J held that in view of, among others, s. 354(3) of the Indian Criminal Procedure Code (CPC (India)), the "extreme penalty (of death penalty) can be inflicted only in gravest cases of extreme culpability". We reproduce below s. 354(3) of the CPC (India):

> *When the conviction is for an offence punishable with death, or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.* (emphasis added)

[31] With respect, we are not in favour of adopting the "rarest of the rare" doctrine in Malaysia. Our reasons are as follows:

(i) in s. 302 of the PC read with ss. 34 and 39 of the AMDP, Parliament has conferred a wide discretion on our courts to mete out the following punishment on a person who has committed a murder offence under s. 302 of the PC:

  (a) death penalty; or

  (b) imprisonment for a term of not less than 30 years but not exceeding 40 years and whipping of not less than 12 strokes

  (wide judicial discretion (s. 302 of the PC));

(ii) our Legislature did not impose any restriction or condition to curtail the wide judicial discretion (s. 302 of the PC). In other words, the wide judicial discretion (s. 302 of the PC) is unfettered. If we have applied the "rarest of the rare" doctrine, this will be tantamount to an unlawful curtailment of the wide judicial discretion (s. 302 of the PC);

(iii) in the exercise of the wide judicial discretion (s. 302 of the PC):

  (a) public interest should be the primary consideration. We rely on the following judgment of the Federal Court delivered by Raja Azlan Shah Ag LP (as His Majesty then was) in *Bhandulananda Jayatilake v. PP* [1981] CLJU 139; [1981] 1 LNS 139; [1982] 1 MLJ 83, at 84:

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I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see Jamieson v. Jamieson [1952] AC 525, 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. (emphasis added)

It is to be noted that when *Bhandulananda* was decided, Parliament had abolished appeals to the Privy Council for constitutional and criminal matters. In other words, when the Federal Court delivered the judgment in *Bhandulananda*, the Federal Court was our apex court for criminal matters at that time;

(b) all the relevant facts and circumstances of the case should be taken into account, including:

(1) mitigating factors; and

(2) aggravating factors.

As explained in the above sub-para. (a), public interest should override mitigating factors; and

(c) the court should also consider the following four objects of sentencing:

(1) deterrence, both specific and general deterrence. Specific deterrence of an offender has also been described as "incapacitation" of the offender (to render the offender incapable of committing any offence in the future);

(2) rehabilitation, reformation or restoration of the offender;

(3) retribution; and

(4) restitution;

(iv) due to the enforcement of s. 354(3) of the CPC (India) (the judgments of Indian courts shall state "special reasons" for imposing a death sentence), the application of the "rarest of the rare" doctrine in India is understandable. Our CPC has no provision which is equipollent to s. 354(3) of the CPC (India); and

(v) section 302 of Singapore's Penal Code (PC (Singapore)) states as follows:

s 302. Punishment for murder

(1) Whoever commits murder within the meaning of section 300(a) shall be punished with death.

(2) Whoever commits murder within the meaning of section 300(b), (c) or (d) shall be punished with death or imprisonment for life and shall, if he is not punished with death, also be liable to caning. (emphasis added)

As s. 302(2) of the PC (Singapore) is similar to our present s. 302 of the PC (after amendment by AMDP), Singapore cases on this matter, are persuasive.

Our above view is supported by a decision of the Court of Appeal of Singapore (its apex court) in *PP v. Kho Jabing* [2015] 2 SLR 112. In *Kho Jabing*, the 3-2 majority judgment of Chao Hick Tin JA, Andrew Phang Boon Leong JA and Chan Seng Onn J allowed an appeal by the prosecution for capital punishment to be imposed in that case. Lee Seiu Kin and Woo Bih Li JJ however dissented on the grounds that the High Court's sentence of life imprisonment and whipping, should be maintained. It is to be emphasised that all the five judges of Singapore's Court of Appeal in *Kho Jabing* had expressly rejected the application of the "rarest of the rare" doctrine in Singapore.

We reproduce below the following three judgments in *Kho Jabing*:

(a) according to Chao Hick Tin JA (concurred by Andrew Phang Boon Leong JA and Chan Seng Onn J), at [8], [37], [38] and [41] to [45]:

[8] At the very heart of this appeal lies a critical legal question - for an offence of murder where the mandatory death penalty does not apply, in what circumstances would the death penalty still be warranted?

…

[37] It is our judgment that the trite and well established sentencing principle that all the circumstances and factors of the case must be taken into consideration in meting out an appropriate sentence continues to apply, and this is supported by the fact that the Minister for Law had stated the three factors in broad terms and specifically mentioned that they were to be

considered in totality. As we see it, these three factors were highlighted because they will very likely surface in any evaluation of a case involving the discretionary death penalty.

[38] Second, the leading principle in other jurisdictions, as the survey above touching on the positions in India, St Vincent and Grenadines, and the United States shows, is that the death penalty should only be imposed for the "rarest of rare" or the "worst of the worst" cases. To follow this principle would mean that it is only in the most extreme of circumstances and the narrowest of cases that the death penalty would be imposed. ...

…

[41] In our respectful opinion, we do not find that the "rarest of rare" principle is appropriate for Singapore. To adopt this principle would be to artificially confine and sequester the death penalty to the narrowest of regions and to restrict the imposition of the death penalty based on whether the actions of the offender are "rare" in comparison with other offenders. This should not be the case in our context. Admittedly, the often cited sentencing principle is that the maximum penalty is only intended for the worst form of cases (see for example, Sim Gek Yong v. PP [1995] 1 SLR(R) 185 at [13], which was cited with approval in the Re-sentencing Judge's Decision ([6] supra) at [12]).

[42] However, the context in which this principle was laid down is different in the sense that in the normal case the sentencing judge has a much wider discretion and a range of penalties from which to choose from. In such a scenario, given that there is a range of penalties reflecting differing degrees of moral culpability, it would make sense that it is only in the worst form of cases that the maximum penalty should be meted out. However, this is not the case with the discretionary death penalty. To quote the Court of Appeal in Sia Ah Kew ([32] supra) at [5], the "discretion given to the courts as regards the sentence is … very limited in scope"; the court does not have the luxury to choose from a range of penalties.

[43] Given the fact that the discretion is confined to only the imposition of either the death sentence or life imprisonment with caning, we do not find that the "rarest of the rare" principle effectively meets the objective of having the discretionary death penalty in our sentencing regime. As explained by the Minister for Law in the parliamentary debates, the objective behind introducing the discretionary death penalty was to balance "the various objectives: justice to the victim, justice to society, justice to the accused, and mercy in appropriate cases". All these considerations must be taken into account, and we do not think that they would be properly reflected if we should adopt the "rarest of the rare" principle.

[44] In our judgment, a more appropriate principle to follow would be that laid down by the Court of Appeal in Sia Ah Kew, which is, whether the actions of the offender would outrage the feelings of the community. Undoubtedly, capital punishment is an expression of society's indignation towards particularly offensive conduct, and the fact that the death penalty continues to be part of our sentencing regime is an expression of society's belief

that certain actions are so grievous an affront to humanity and so abhorrent that the death penalty may, in the face of such circumstances, be the appropriate, if not the only, adequate sentence. It would therefore, in our judgment, be correct to consider the strong feelings of the community in deciding whether or not to impose the death penalty.

[45] In determining whether the actions of the offender would outrage the feelings of the community, we find that the death penalty would be the appropriate sentence when the offender has acted in a way which exhibits viciousness or a blatant disregard for human life. Viewed in this light, it is the manner in which the offender acted which takes centre stage. For example, in the case of a violent act leading to death, the savagery of the attack would be indicative of the offender's regard for human life. The number of stabs or blows, the area of the injury, the duration of the attack and the force used would all be pertinent factors to be considered. (emphasis added)

(b) Lee Seiu Kin J gave the following judgment, at [86]:

[86] The key issue in this appeal is whether the death penalty should be imposed on Jabing under s. 302(2) of the PC. I should state at the outset that I respectfully agree with the analysis in the Majority Judgment of the law in relation to the imposition of the death penalty on a charge under s. 300(c), and punishable under s. 302(2), of the PC. In particular, I agree that the "rarest of rare" principle is not appropriate for Singapore (see [43] above). I agree with the formulation of the test set out in the Majority Judgment at [44] above, ie, it is a question of whether the offender's acts are "so grievous an affront to humanity and so abhorrent" that the death penalty is the only adequate sentence. I also am further in complete agreement that, in the context of the present case, capital punishment would be appropriate where the offender had "acted in a way which exhibits viciousness or a blatant disregard for human life" (see the Majority Judgment at [45] above). (emphasis added)

(c) Woo Bih Li J decided as follows at [203]:

[203] I agree with the principles set out in [44] and [45] of the Majority Judgment as to when it would be appropriate to impose the death penalty for an offence of murder where the conviction is made under s. 300(c) [PC (Singapore)]. (emphasis added)

We hasten to add that the tests propounded in *Kho Jabing*, namely "whether the actions of the offender would outrage the feelings of the community", "whether the offender's acts are so grievous an affront to humanity and so abhorrent that the death penalty is the only adequate sentence" and whether "capital punishment would be appropriate where the offender had acted in a way which exhibits viciousness or a blatant disregard for human life" would be relevant factors in the exercise of the wide judicial discretion (s. 302 of the PC) (with public interest as the primary consideration).

[32] Needless to say, a sentence meted out by a court in a particular case will necessarily depend on the particular facts and circumstances of that case. From the viewpoint of the doctrine of *stare decisis*, a court's sentence cannot constitute a binding precedent. Having said that, a sentence imposed by a court provides a useful "sentencing guideline" for other courts in the future.

Whether Court Of Appeal Should Reduce Death Sentence (High Court)

[33] The appellant's learned counsel had advanced the following mitigating factors to persuade us to reduce the death sentence (High Court) to an imprisonment for 30 years only:

(i) the appellant lost control due to the alleged deceased's verbal provocation;

(ii) the appellant was a first offender. In other words, before this case, the appellant had a clean record (without any prior conviction);

(iii) the appellant is remorseful and has turned over a new leaf; and

(iv) the appellant is now 50 years old

(appellant's mitigating circumstances).

[34] Premised on the wide judicial discretion (s. 302 of the PC), we maintain the death sentence (High Court). This exercise of discretion is premised on the following reasons:

(i) it is in the public interest for the death sentence (High Court) to be maintained because:

(a) the existence of the appellant's pre-meditated intention (murder) – please refer to the above sub-paras. 24(iii)(a) and (b);

(b) when the appellant opened the door to the front passenger seat of the car, he knew that PW9 was inside the car and yet, the appellant's pre-meditated intention (murder) was carried out. This means that when the appellant entered the car, he not only had the pre-meditated intention to murder the deceased but also PW9 (so that PW9 could not testify subsequently against the appellant in court);

(c) the appellant's pre-meditated intention (murder) was carried out in a most violent manner by inflicting the deceased's neck wound (17cm long). Great force was used by the appellant to cause the deceased's neck wound (17cm long);

(d) after the appellant had murdered the deceased, the appellant attempted to murder the only eyewitness to his heinous crime against the deceased, *ie*, PW9. It is to be borne in mind that PW9 was only 12 years old at the material time and yet, the appellant attempted to snuff out the life of this child;

(e) the appellant had caused PW9's severe injuries, namely:

(1) the fifth finger on PW9's left hand was severed; and

(2) a slash was inflicted on PW9's right jaw.

In addition to PW9's severe injuries, PW9 would suffer permanent psychological and emotional trauma due to the appellant's assault on PW9; and

(f) in accordance with the aim of public deterrence, the court must send a clear message to the public that any person who carries out his or her pre-meditated intention to murder another person and at the same time attempts to murder a child eyewitness, should face the death sentence;

(ii) the above considerations in sub-paras. (i)(a) to (f) regarding public interest far out-weigh the appellant's mitigating circumstances; and

(iii) the appellant did not show any remorse because he had given untrue sworn evidence as follows:

(a) despite the existence of the appellant's pre-meditated intention (murder), the appellant alleged that the alleged deceased's verbal provocation had been made; and

(b) the appellant testified that PW9's finger was cut because PW9 tried to take away the parang from the appellant. It defies belief how a 12-year-old boy could attempt to take the parang from a person who had just murdered the boy's brother-in-law in the presence of the boy;

[35] Alternatively, even if we have applied the "rarest of the rare" test, the considerations stated in the above sub-paras. 34(i)(a) to (f) clearly show that this case falls within the category of the "rarest of the rare".

Conclusion

[36] The upshot is:

(i) a dismissal of this appeal; and

(ii) an affirmation of both the conviction (High Court) and death sentence (High Court).